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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARK D. POTTER, Plaintiff and Appellant, v. ILLINOIS STUDENT ASSISTANCE COMMISSION, Defendant and Respondent.	D042493 (Super. Ct. No. GIC804271)

APPEAL from a judgment of the Superior Court of San Diego County, Vincent P. DiFiglia, Judge. Affirmed.

Plaintiff Mark D. Potter appeals from a judgment of dismissal following the court's sustaining of defendant Illinois Student Assistance Commission's (ISAC's) demurrer to his first amended complaint. Potter alleged in his complaint that ISAC violated the Consumer Credit Reporting Agencies Act (CCRAA) (Civil Code, § 1785.2 et seq.)[1] by allegedly providing inaccurate or incomplete information on credit transactions

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1 All further statutory references are to the Civil Code unless otherwise specified.

to consumer credit reporting agencies. ISAC demurred to the complaint, arguing that federal law preempted the CCRAA. The court agreed, sustaining ISAC's demurrer without leave to amend and dismissing Potter's complaint as against ISAC.[2]

Potter appeals, asserting that (1) the CCRAA was not preempted by federal law; and (2) the court erred in not allowing Potter to amend his complaint to state a violation of federal law. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Underlying Transactions*

Potter obtained a federal supplemental loan for students (SLS) in July 1990 to attend the McGeorge School of Law. The lender was Sallie Mae and the guaranty agency was ISAC. Potter's loan became delinquent and ISAC instituted collection actions and reported Potter's delinquency to credit reporting agencies.

B. *Potter's Complaint*

In March 2003, Potter filed an action against ISAC, asserting one cause of action for a violation of the CCRAA. Potter asserted that ISAC provided inaccurate or incomplete information to credit reporting agencies. Specifically, Potter alleged that ISAC reported his student loan as delinquent even after the loan obligation was satisfied. Potter also alleged that he gave notice to ISAC of the inaccuracies in his credit report but that ISAC did not correct them. Potter further alleged that as a result of the inaccurate

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[2] Potter's complaint also named other defendants, who are not parties to this appeal.

and incomplete information, he was denied credit and was delayed in the purchase of real property.

C. *ISAC's Demurrer*

ISAC demurred to the complaint, arguing that the CCRAA was preempted by the federal Higher Education Act of 1965 (HEA), title 20 United States Code section 1071 et seq., and the Fair Credit Reporting Act (FCRA), title 15 United States Code 1681 et seq. Potter opposed the demurrer, asserting that his action was not preempted because (1) the CCRAA did not hinder or prohibit collections activities taken under federal law, and (2) the CCRAA was not in conflict with federal law.

D. *Court's Ruling*

In May 2003, the court sustained ISAC's demurrer, finding that Potter's action was preempted by federal law as section 1785.3 "imposes inconsistent and/or greater obligations on [ISAC] than are imposed under the [HEA] and Regulations of the Department of Education." The court sustained the demurrer without leave to amend as Potter did not offer any evidence that the defect in the complaint could be cured by an amendment.

This appeal followed.

DISCUSSION

A. *Standard of Review*

In reviewing a judgment entered after the sustaining of a demurrer to a complaint, we must determine whether the complaint alleges sufficient facts to state a cause of action. In so doing, we accept as true all material facts properly pleaded in the complaint.

(*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We will only reverse a court's order sustaining a demurrer upon a clear showing of error or an abuse of discretion. (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1076.)

B. *General Principles of Preemption*

"The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law. 'Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.' [Citation.] Thus, preemption 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' [Citation.] 'Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.' [Citation.]" (*Independent Energy Producers Association, Inc. v. California Public Utilities Commission* (9th Cir. 1994) 36 F.3d 848, 853.)

"If Congress decides to exert exclusive authority over a particular area of interstate commerce, it might choose to invalidate all state laws on the subject matter, regardless of whether the state law is inconsistent or identical to federal law. Where federal

preemption is not absolutely reserved for the regulation or prohibition of Congress, federal and state law may coexist simultaneously to the extent state law does not stand in conflict with federal law." (*Lin v. Universal Card Services Corporation* (N.D.Cal. 2002) 238 F.Supp.2d 1147, 1150-1151 (*Lin*), fns. omitted.)

Here, it is not asserted that the HEA or FCRA constitute "express preemption" or "field preemption" of state laws such as the CCRAA. Rather, ISAC maintains that the CCRAA conflicts with the HEA and FCRA, or that the CCRAA is an obstacle to the accomplishment of the goals of those federal statutes. We address the preemption arguments related to each statutory scheme in turn.

C. *Potter's Complaint Is Preempted by the HEA*

Student loan guaranty agencies such as ISAC are governed by the HEA and the rules and regulations of the Department of Education. (20 U.S.C. §§ 1071, 1078-1, 1082; 34 C.F.R. § 682.100 (2003).) The Secretary of Education is authorized to prescribe rules and regulation necessary to carry out the purposes of the HEA. (20 U.S.C. § 1092(a)(1).) The regulations set forth minimum standards for "collection activities" under the loans. (34 C.F.R. §§ 682.410(b)(4), 682.411 (2003).) Among the obligations is for holders of loans to report the status of the loans to credit reporting agencies. (20 U.S.C. § 1080a; 34 C.F.R. § 682.411 (2003).) In this regard, the regulations provide:

> "(5) Credit bureau reports. [¶] (i) After the completion of the procedures in paragraph (b)(5)(ii) of this section, *the guaranty agency shall*, after it has paid a default claim, *report promptly*, but not less than sixty days after completion of the procedures in paragraph (b)(6)(v) of this section, and on a regular basis, *to all national credit bureaus*-- [¶] (A) *The total amount of loans made to the borrower and the remaining balance of those loans*; [¶] (B) *The*

> *date of default*; (C) *Information concerning collection of the loan, including the repayment status of the loan*; [¶] (D) *Any changes or corrections in the information reported by the agency that result from information received after the initial report*; and [¶] (E) *The date the loan is fully repaid by or on behalf of the borrower or discharged by reason of the borrower's death, bankruptcy, total and permanent disability, or closed school or false certification*. [¶] (ii) *The guaranty agency*, after it pays a default claim on a loan but before it reports the default to a credit bureau or assesses collection costs against a borrower, *shall*, within the timeframe specified in paragraph (b)(6)(v) of this section, *provide the borrower with*-- [¶] (A) *Written notice* that meets the requirements of paragraph (b)(5)(vi) of this section *regarding the proposed actions*; [¶] (B) *An opportunity to inspect and copy agency records pertaining to the loan obligation*; [¶] (C) *An opportunity for an administrative review of the legal enforceability or past-due status of the loan obligation; and* [¶] (D) *An opportunity to enter into a repayment agreement on terms satisfactory to the agency*." (34 C.F.R. § 682.410, subd. (b)(5)(i) (2003), italics added.)

Additionally, 34 Code of Federal Regulations part 682.410 has a preemption clause that states:

> "(8) Preemption of State law. The provisions of paragraphs (b)(2), (5), and (6) of this section preempt any State law, including State statutes, regulations, or rules, *that would conflict with or hinder satisfaction of the requirements of these provisions*." (34 C.F.R. § 682.410(b)(8) (2003), italics added.)

The Secretary of Education has interpreted the HEA as preempting any state laws in conflict with the collection activities of guaranty associations such as ISAC:

> "The Secretary interprets regulations issued for the Stafford Loan Program (formerly the Guaranteed Student Loan Program), the Supplemental Loans for Students (SLS) Program, the PLUS Program, and the Consolidation Loan Program, collectively referred to as the Guaranteed Student Loan (GSL) Programs, that prescribe the actions lenders and guarantee agencies must take to collect loans guaranteed under the GSL Programs. *The substance of the interpretation is that these regulations preempt State law regarding*

> *the conduct of these loan collection activities*. (55 Fed.Reg. § 40120-01 (Oct. 1 1990).)

In that interpretation the Secretary of Education also stated that state law would be inconsistent with the HEA and its regulations, if it would "prohibit, restrict, or impose burdens" on collection activities by guaranty associations such as ISAC. (55 Fed.Reg. § 40120-01 (Oct. 1, 1990).)

From the face of the CCRAA and HEA, the federal provisions governing notification of credit reporting agencies do not conflict with state law. The HEA provides that "no information is disclosed by the Secretary or the guaranty agency . . . unless its accuracy and completeness have been verified and the Secretary or the guaranty agency has determined that disclosure would accomplish the purpose of this section." (20 U.S.C. § 1080a(c)(1).) The CCRAA similarly provides: "A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." (§ 1785.25, subd. (a).) Thus, as both the HEA and the CCRAA are substantially similar as to requirements for reporting information to credit reporting agencies, there is no conflict and no preemption as to these provisions.

ISAC argues, however, that the enforcement mechanisms of the HEA are in conflict with the CCRAA. ISAC maintains that as Congress did not intend to allow any private right of action to remedy an alleged violation of HEA's reporting requirements, any state law remedies are preempted. ISAC's contentions are well taken.

Section 1082 of the HEA vests the Secretary of Education with broad and substantial enforcement authority. The Secretary may sue and be sued in any federal district court. (20 U.S.C. § 1082(a)(2).) The Secretary may "enforce, pay, or compromise, any claim on, or arising because of, any such insurance or any guaranty agreement . . . ." (*Id.*, § 1082(a)(5).) The Secretary is authorized to impose civil penalties, after notice and a hearing, against a guaranty agency for a violation or failure to carry out any provision of the HEA or its implementing regulations. (20 U.S.C. § 1082(g)(1).) The Secretary is also empowered to compromise any of the penalties until either the matter is referred to the Attorney General or the guaranty agency has commenced judicial review of a final agency determination. (*Id.*, § 1082(g)(6).) Noticeably absent from these detailed powers and procedures is any provision for borrowers to proceed by suit against a guaranty agency.

"The statute and regulations explicitly delegate power to the Secretary to supervise and enforce the student loan program and participating institutions' conformance with the Act. Where a statute provides an administrative enforcement mechanism, the presumption is that no private cause of action is intended. [Citations.] [The HEA] gives extensive enforcement authority to the Secretary indicating that Congress intended this mechanism to be the exclusive means for ensuring compliance with the statutes and regulations." (*L'ggrke v. Benkula* (10th Cir. 1992) 966 F.2d 1346, 1348.)

"The express language of the HEA, and the regulations promulgated thereunder, do not 'create a private cause of action, and there is nothing in the Act's language, structure or legislative history from which a congressional intent to provide such a

remedy can be implied.' [Citations.] To allow affirmative damage suits based on state law would, therefore, undoubtedly conflict with the federal objectives of the HEA. Such actions would, for example, seriously frustrate Congress' goal of increasing loan availability by making the [student loan program] more attractive to commercial lenders." (*Morgan v. Markerdowne Corp.* (D.N.J. 1997) 976 F.Supp. 301, 319; see also *L'ggrke v. Benkula, supra,* 966 F.2d at p. 1348; *Labickas v. Arkansas State University* (8th Cir. 1996) 78 F.3d 333, 334 ; *Williams v. National School of Health Technology* (E.D.Pa. 1993) 836 F.Supp. 273, 278-280; *Jackson v. Culinary School of Washington* (D.D.C. 1992) 788 F.Supp. 1233, 1256-1259.)

A federal statute preempts state law if the state law "stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*California Federal Savings & Loan Association v. Guerra* (1987) 479 U.S. 272, 281.) As the foregoing authority makes clear, allowing Potter to assert his state-law claims, which are based on ISAC's alleged violations of HEA, would undercut the exclusive administrative remedy provided by Congress. Accordingly, the state-law claims are preempted and were properly dismissed.

D. *Potter's Complaint Is Also Preempted by the FCRA*

That portion of the FCRA relating to the furnishers of consumer credit information, title 15 United States Code section 1681t, provides as follows regarding preemption of state laws:

> "Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of

> any State with respect to the collection, distribution, or use of any information on consumers, *except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency*." (15 U.S.C. § 1681t(a), italics added.)

Thus, "Congress did not enact the FCRA with the goal of vitiating all state laws, but only those that are inconsistent with the federal law." (*Lin, supra,* 238 F.Supp.2d at p. 1151.) In fact, the FCRA specifically exempted that portion of the CCRAA delineating the duties of a furnisher of information to credit reporting agencies from its preemptive effect:

> "No requirement or prohibition may be imposed under the laws of any State-- [¶] (1) with respect to any subject matter regulated under-- [¶] . . . [¶] (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply-- [¶] . . . [¶] (ii) *with respect to section 1785.25(a) of the California Civil Code* . . . ." (15 U.S.C. § 1681t(b)(1)(F)(ii), italics added.)

This exception from preemption is consistent with Congress's intention to only preempt state laws inconsistent with the FCRA as section 1785.25, subdivision (a) of the CCRAA is similar to the language of title 15 United States Code section 1681s-2(a)(1)(A) of the FCRA. (*Lin, supra,* 238 F.Supp.2d at p. 1151.) Civil Code section 1785.25, subdivision (a) provides that "[a] person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Title 15 United States Code section 1681s-2(a)(1)(A) similarly provides that "[a] person shall not furnish any information relating to a consumer to any reporting agency if the person knows or consciously avoids knowing that the information is inaccurate." Thus, as these two

provisions do not conflict, and as Civil Code section 1785.25, subdivision (a) was expressly exempted from preemption, that portion of the CCRAA is not preempted by the FCRA.

However, as we discussed with regard to the HEA, this does not end our analysis. "[T]he next inquiry is to determine whether [section 1785.25, subdivision (a)] affords consumers the right to sue furnishers of consumer credit information." (*Lin, supra,* 238 F.Supp.2d at pp. 1151-1152.) The district court in *Lin* determined that since the FCRA provided no private right of action against the providers of consumer credit information, sections of the CCRAA providing for such a private right of action were preempted by the FCRA. (*Lin, supra,* 238 F.Supp.2d at pp. 1152-1153.)

Section 1785.25, subdivision (g) provides that a "person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with those provisions." Section 1785.31, subdivision (a) provides a private right of action for any person who suffers damages from a violation of the CCRAA, allowing them to "bring an action in a court of appropriate jurisdiction against that person."

However, the federal counterpart, title 15 United States Code section 1681s-2(d) provides that there is *no* private right of action by a consumer against a provider of information to a credit reporting agency for its false reports to the credit reporting agency:

> "(a) Duty of furnishers of information to provide accurate information [¶] (1) Prohibition [¶] (A) Reporting information with actual knowledge of errors [¶] *A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate.* (B) Reporting information after notice and confirmation of errors [¶] A person shall not furnish information relating to a consumer to any consumer reporting agency if-- [¶] (i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and [¶] (ii) the information is, in fact, inaccurate. [¶] (C) . . . [¶] (2) Duty to correct and update information [¶] A person who-- [¶] (A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and [¶] (B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, [¶]shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate. [¶] . . . [¶] (*d*) *Limitation on enforcement* [¶] *Subsection* (*a*) *of this section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials and the State officials identified in that section*." (Italics added.)

Thus, the FCRA conflicts with the CCRAA because it does not allow a private right of action by consumers against furnishers of information, while sections 1785.25, subdivision (g) and 1785.31, subdivision (a) do. As noted by the *Lin* court, "These California provisions regarding private right of actions are *not* excepted from preemption in the FCRA. Only [section 1785.25, subdivision (a)] of the CCRAA, which does not provide for a private right of action, is excluded from preemption. Based on the plain language of the statute, Congress did not exclude from preemption CCRAA [sections] 1785.25[, subdivision] (g) and 1785.31." (*Lin, supra,* 238 F.Supp.2d at p. 1152.) As the

court in *Lin* explained, "These provisions were not excepted from preemption, however, because they are *in*consistent with the enforcement scheme of Congress under FCRA [section] 1681s-2(d), in matters relating to furnishers of consumer credit information. Congress intended to have exclusive authority to enforce such claims through 'the Federal Agencies and officials and the State officials identified in that section.'" (*Lin, supra,* 238 F.Supp.2d at p. 1152; see also *Hasvold v. First USA Bank, N.A.* (D.Wyo. 2002) 194 F.Supp.2d 1228, 1239 [consumer's state law claims against furnisher of information to credit reporting agency were preempted by FCRA]; *Riley v. General Motors Acceptance Corp.* (S.D.Ala. 2002) 226 F.Supp.2d 1316. 1323 [same].)

Potter asserts that his action is not preempted because subdivision (d) of title 15 United States Code section 1681s-2 only provided that there was no private right of action for claims brought under subdivision (*a*) of that section. He claims that his action was brought under subdivision (*b*), which is not subject to the no private right of action language in subdivision (d). This contention is unavailing.

Title 15 United States Code section 1681s-2(b) provides:

> "(b) Duties of furnishers of information upon notice of dispute [¶] (1) In general [¶] After receiving notice pursuant to section 1681i(a)(2) of this title [which requires a consumer reporting agency to notify the furnisher of information regarding customer disputes within five days of the reporting agency's receiving notification from the consumer of the same] . . . the [furnisher] shall-- [¶] (A) conduct an investigation with respect to the disputed information; [¶] (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title; [¶] (C) report the results of the investigation to the consumer reporting agency; and [¶] (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting

> agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis."

"Most of the courts considering the issue have concluded that [title 15 United States Code] Section 1681s-2(b), unlike [title 15 United States Code] Section 1681-2(a), may form the basis for a private cause of action, so long as the plaintiff shows that the furnisher 'received notice from a *consumer reporting agency*,' as opposed to the plaintiff alone, 'that the credit information is disputed.' [Citation.]" (*Hasvold, supra,* 194 F.Supp.2d at p. 1236, quoting *Dornhecker v. Ameritech Corp.* (N.D.Ill. 2000) 99 F.Supp.2d 918, 928-929.) However, here Potter has alleged that he directly contacted ISAC concerning alleged inaccurate information it provided to credit reporting agencies, not that ISAC received notice from a consumer reporting agency concerning disputed credit information. Therefore, his claim is governed by subdivision (a), not (b), of title 15 United States Code section 1681s-2, and no private right of action exists for enforcement of that provision. (*Hasvold, supra,* 194 F.Supp.2d at pp. 1236-1239.) Potter's claim is therefore preempted by the FCRA and the court did not err in sustaining ISAC's demurrer. (*Ibid.*; see also *Carney v. Experian Information Solutions, Inc.* (W.D.Tenn. 1999) 57 F.Supp.2d 496, 503.)

E. *Leave To Amend*

The denial of leave to amend is reviewed under an abuse of discretion standard. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) The burden is on the plaintiff to show how the pleading can be amended and how the amendment will change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

In opposing ISAC's demurrer, Potter did not request leave to amend. The first request was made *orally* by Potter at the hearing on ISAC's demurrer. However, Potter has not provided a transcript of that hearing, and thus we do not know whether he demonstrated how the complaint could be amended and how it would change the legal effect of the pleading. There is no indication that he provided an amended complaint to the court containing a proposed amendment. On this record, therefore, we cannot say that the court abused its discretion in denying leave to amend.

On appeal, Potter does make specific arguments why his request for leave to amend should be granted. Although they are raised for the first time on appeal, we may consider these contentions. (Code Civ. Proc, § 472c, subd. (a); *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 590.) However, his assertions are not well taken.

Potter asserts that he should have been allowed leave to amend to state a claim under the FCRA. As discussed above, however, there is no private right of action under title 15 United States Code section 1681s-2(a). Potter contends that he could state a claim under subdivision (b) of that statute. However, he has not provided a proposed amended complaint demonstrating how he could amend his pleading to state a valid claim under that section. Further, as we have already discussed, Potter's claims are preempted by the HEA, prohibiting suits against guaranty agencies for violations of that statute under *any* law.

Potter also asserts that he could amend his complaint to state a cause of action under Business and Professions Code section 17200. However, while it is true that any business practice that violates any law may be targeted under Business and Professions

Code section 17200 (see *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383), because there is no private right of action under the HEA or the FCRA, *any* state law claims are preempted. (*Lin, supra,* 238 F.Supp.2d at p. 1152; *L'ggrkev. Benkula, supra,* 966 F.2d at p. 1348.)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.